No. 88-1434

IN THE

Supreme Court of the United States

October Term, 1988

ELIZABETH M. DOLE, Secretary of Labor, *et al.*
Petitioners,

v.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, *et al.*
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICI CURIAE, NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION, FOOD MARKETING INSTITUTE, AND NATIONAL GROCERS ASSOCIATION IN SUPPORT OF REVERSAL

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STATEMENT OF INTEREST

This brief is respectfully submitted on behalf of the National-American Wholesale Grocers' Association, the Food Marketing Institute, and the National Grocers Association as *amici curiae*. The three trade associations joining in this brief are representatives of this nation's wholesale and retail distributors of food, grocery, and related products who would be adversely affected if the decision below is allowed to stand. *Amici* support the position of the federal Petitioners and urge reversal of the decision below. The written consent of all parties of

record to *amici's* submission of this brief has been filed with this Court.

The National-American Wholesale Grocers' Association (NAWGA) is a national trade association comprised of grocery wholesale distribution companies which primarily supply and service independent grocers throughout the United States and Canada. It provides research, technical, educational, and government relations programs on behalf of its 400 members. NAWGA members operate nearly 1,200 distribution centers nationwide with a combined annual sales volume in excess of $81 billion, accounting for nearly three-quarters of the nation's grocery supply sales. NAWGA members employ in excess of 350,000 people nationwide; in combination with their independently owned supermarkets, they provide employment for several million people. The independent grocer represents over 50% of the total retail food sales in this country and is one of the strongest segments of independent business in the nation. NAWGA's foodservice division, the International Foodservice Distributor's Association (IFDA), represents member firms that sell annually over $20 billion in food and related products to the institutional, away-from-home foodservice market.

The Food Marketing Institute (FMI) is a nonprofit association conducting programs in research, education, and public affairs on behalf of its 1,500 members, who are food retailers and wholesalers and their customers in the United States and overseas. FMI's domestic member companies operate more than 17,000 retail food stores with a combined annual sales volume accounting for one-half of all grocery sales in the United States. More than three-fourths of the FMI's membership is composed of independent supermarket operators or small regional firms.

The National Grocers Association (NGA) is a national trade

association representing over 2,300 retail grocers, retailer-owned cooperatives, and food wholesalers in the independent small business sector of the food industry. NGA retail grocers operate over 50,000 retail food stores, including convenience stores, grocery stores, and supermarkets throughout the United States. NGA's retailer-owned cooperatives and food wholesalers distribute food, grocery, and related products through their food distribution centers to retail grocers.

On August 24, 1987, the Occupational Safety and Health Administration (OSHA) promulgated a revised and expanded Hazard Communication Standard (HCS), 29 C.F.R. § 1910.1200 (1988), that applies to the food and grocery distribution industries, as well as other industries in the non-manufacturing sector of the economy. The primary purpose of the revised and expanded HCS is to provide workers in all industries with information about the safe handling and use of hazardous products in the workplace. 52 Fed. Reg. 31852 (Aug. 24, 1987).

As promulgated, the HCS covers a large number of everyday household products, such as oven cleaner, bleach, floor wax, and charcoal briquettes; analogous products packaged for institutional use; and drug products. A typical member firm of *amici* may handle up to 1,200 different products subject to the HCS. Each product covered by the HCS is the subject of a Material Safety Data Sheet (MSDS), which generally describes the characteristics and hazards of the product, is typically one to four pages in length, and is prepared by the product manufacturer. MSDSs must be distributed downstream, from product manufacturers through wholesale distribution channels, to retailers so they can be given to any ultimate purchasers that will use the products on the work site. Because each wholesale distribution facility may service thousands of different retail or institutional foodservice

establishments, the HCS will require that facility to obtain, maintain, and distribute millions of pieces of paper each year.

Inclusion of common household products within the scope of the HCS creates significant paperwork burdens for the food and grocery distribution industries and also duplicates the regulatory requirements of other federal agencies. At the same time, these products typically present worker risks that are trivial and commonly known.

Under the authority of the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.*, the Office of Management and Budget (OMB) reviewed the HCS and approved the overwhelming bulk of its requirements. In relevant part, OMB disapproved any coverage of consumer products, similar products in the same form and concentration as consumer products, and drug products from the scope of the HCS. The HCS became effective save for those provisions OMB disapproved.

In the case before this Court, the United States Court of Appeals for the Third Circuit reversed OMB's disapproval and reinstated OSHA's onerous requirements, resulting in a wholly unnecessary paperwork burden on the food and grocery distribution industries that will result in no significant benefit for employees. Accordingly, *amici* have a strong economic interest in the outcome of this case and respectfully urge this Court to uphold OMB's authority to disapprove needless and duplicative provisions of the HCS under the Paperwork Reduction Act.

PROCEEDING BELOW

In the proceeding below, the Third Circuit held that OMB did not have statutory authority, under the Paperwork Reduction Act, to disapprove provisions of the HCS as applied to, in relevant part, consumer products and drug products. *United*

Steelworkers v. Pendergrass, 855 F.2d 108 (3d Cir. 1988) (*USWA III*). The Third Circuit based its decision on two separate grounds. First, the Third Circuit concluded that the regulations disapproved by OMB do not involve the "collection of information" within the meaning of the Act. *Id.* at 112. Second, the Third Circuit held that OMB had impermissibly substituted its judgment on substantive matters for OSHA's judgment. *Id.* at 113.

SUMMARY OF ARGUMENT

The HCS provisions disapproved by OMB, which were clearly "information collection requests" within the meaning of the Paperwork Reduction Act, would impose huge burdens on the food and grocery distribution industries. Tens of millions of individual pieces of paper would have to be produced, transferred, filed, and updated by a distribution system encompassing at least three distinct tiers and thousands of individual firms. These burdens would not result in any discernible contribution to OSHA's mission of protecting worker safety and health. Workers are already extensively protected by existing labeling requirements and by training requirements of the HCS that remain in force as well as by regulation of these products by other federal agencies.

Prior judicial decisions have noted that an agency's focus on its area of immediate concern may cause it to impose great costs that produce little or no benefit. Under the Paperwork Reduction Act, OMB has the responsibility to protect against this tendency by ensuring that agencies do not impose heavy information collection burdens that are unnecessary to the performance of the agency's mission or duplicative of requirements imposed by other statutes. That responsibility was properly exercised here.

The reversal of OMB's decision by the Third Circuit should be vacated and OMB's implementation of the Paperwork Reduction Act should be upheld by this Court.

ARGUMENT

I. THE HAZARD COMMUNICATION STANDARD PROVISIONS REINSTATED BY THE UNITED STATES COURT OF APPEALS FOR THIRD CIRCUIT IMPOSE UNWARRANTED BURDENS UPON THE FOOD AND GROCERY DISTRIBUTION INDUSTRIES WITHOUT BESTOWING ANY APPRECIABLE BENEFITS.

Amici note initially that a reversal of the Third Circuit's judgment would not, nor should it, leave employees in the food and grocery distribution industries totally outside of the scope and coverage of the HCS. To the extent that employees within these industries actually use "hazardous" products, employers would still be required to train and inform employees about the proper storage, use, and handling of these products. For example, all of the HCS's requirements, including employee safety training and the maintenance of MSDSs, would still be observed for such substances as waste oil and diesel fuel in a warehouse's delivery truck repair shop.

Turning to the relevant regulatory provisions, the HCS requires manufacturers of so-called "hazardous" products to prepare MSDSs for their products.[1] 29 C.F.R. § 1910.1200(g)

[1]Industries in which employees only handle "hazardous" products in sealed containers are, in theory, subject to slightly less stringent requirements than industries in which "hazardous" products are used. *See* 29 C.F.R. § 1910.1200(b)(4) (1988). Nevertheless, firms in these industries, such as warehousing and retailing, are required to maintain copies of MSDSs received from product manufacturers, to obtain any MSDSs not received from product manufacturers upon the request of any employee, and to ensure that MSDSs are available to employees during each workshift in their work areas. 29 C.F.R. § 1910.1200(b)(4)(ii) (1988). As a practical matter, the "sealed container" provisions are of no benefit to *amici's* members.

(1988). The HCS does not set forth a list of all "hazardous" products. Rather, manufacturers are required to evaluate their products, using criteria that are part of the HCS, to determine whether the products are "hazardous." *See* 29 C.F.R. § 1910.1200(d) (1988) and its Appendices A, B, and C. These criteria are very broad and much discretion is left to the product manufacturers. As a result, up to 1,200 everyday household products handled by *amici's* members are covered by MSDSs.

An MSDS for a "hazardous" product is required to include the following information: chemical and common name(s), physical and chemical characteristics, physical hazards, health hazards, primary routes of contact, information about the permissible exposure limits, generally applicable precautions for safe handling and use, whether the substance is identified as a possible carcinogen, emergency and first aid procedures, and the identity and telephone number of a source of additional information regarding emergency procedures. 29 C.F.R. § 1910.1200(g) (1988). There is no required standard format for an MSDS. While the information contained in MSDSs is undoubtedly useful for some types of products, this information is unnecessary for the types of household and consumer products distributed by *amici's* members.

Manufacturers of "hazardous" products are required to distribute MSDSs to their downstream customers, including firms in the food and grocery distribution industries. 29 C.F.R. § 1910.1200(g)(6) and (7) (1988). In turn, wholesalers must make the MSDSs available to subsequent wholesale distributors and retailers, who are required to provide MSDSs

to the ultimate purchasers of these products should the product be used in any employment setting, as well as to institutional customers such as foodservice establishments. 29 C.F.R. § 1910.1200(g)(6) and (7) (1988). Under the HCS reinstated by the Third Circuit, wholesalers must pass down MSDSs to retailers unless all purchasers from the retailer are not "commercial customers"[2] and the retailer so informs the wholesaler. 29 C.F.R. § 1910.1200(g)(7) (1988). Whether a particular end purchaser is a "commercial customer" depends on the manner in which the product ultimately will be used.

Each member of the food and grocery distribution industries represented by *amici* handles up to 1,200 different products that are covered by MSDSs prepared by the products' manufacturers. Many products covered by MSDS requirements also come under different brands, thereby further multiplying the number of required MSDSs. These products include a variety of everyday household products such as household cleanser, bleach, charcoal briquettes, and oven cleaner; analogous products of the same form and concentration but packaged for use by institutional foodservice kitchens such as restaurants and caterers; and prescription and over-the-counter (OTC) drug products.[3]

[2]A "commercial customer" is one that purchases a product for on-the-job use. *See* 52 Fed. Reg. 31866 (Aug. 24, 1987). After the OMB disapproval decision, OSHA proposed to define "commercial account" as "an arrangement whereby a retail distributor sells hazardous chemicals to an employer, generally in large quantities over time and at costs that are below the regular retail price." 53 Fed. Reg. 29822, 29852 (Aug. 8, 1988). That rulemaking is still pending.

[3]Arguably, some food products might be within the scope of the HCS. In particular, food products for institutional use might be covered because they are not expressly exempt. *See* 29 C.F.R. § 1910.1200(b)(6)(v) (1988) (HCS exemption for food "in a retail establishment which are packaged for sale to consumers").

As promulgated in August 1987, the HCS includes two limited exemptions for these products that in theory have some applicability to the food and grocery distribution industries. Although well-intended, these exemptions are of no practicable utility. Accordingly, members of *amici* are still subject to the tremendous burdens associated with the MSDS requirements.

A. The HCS Exemption for CPSC-Regulated Products Is of No Use to the Food and Grocery Distribution Industries

Products regulated by the Consumer Product Safety Commission (CPSC) were exempted from the scope of the HCS provided "the employer can demonstrate [the products or substances are] used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers." 29 C.F.R. § 1910.1200(b)(6)(vii) (1988).[4]

In fact, the exemption for CPSC-regulated products is of no value to the food and grocery distribution industries. Should a subsequent purchaser use the product or substance in the workplace in a manner that exceeds normal consumer usage, *amici*, as part of the distribution chain, would still be required to obtain, retain, and disseminate an MSDS concerning that product or substance. Members of *amici* cannot ensure that CPSC-regulated products will not be purchased from a retail store by an employer and used on-the-job by a worker in a manner that exceeds typical consumer usage.

[4]"Consumer products," as defined in the Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq.*, and "hazardous substances," as defined in the Federal Hazardous Substances Act, 15 U.S.C. § 1261 *et seq.*, are within the scope of the regulatory exemption. 29 C.F.R. § 1910.1200(b)(6)(vii) (1988).

The inadequacy of this exemption is compounded in its application to the MSDS pass down requirement. A wholesaler of "hazardous" products need not provide MSDSs to a retail account that has affirmatively notified the wholesaler that the products are neither used on-the-job by the retailer's own employees nor sold at the retail level to commercial customers. 29 C.F.R. § 1910.1200(g)(7) (1988). However, a typical grocery retailer has thousands of different, anonymous customers. Short of the absurd task of asking every one of thousands of different customers about the intended use of thousands of "hazardous" products sold by the retailer, the retailer has no choice but to assume that some "hazardous" products are being purchased by employers for use on the work site.[5] Moreover, even if some retailers were to notify their suppliers that MSDSs are not required for certain products, there would nevertheless be a significant paperwork burden associated with tracking each retailer and each product. As a practical matter, a wholesaler might conclude it is easier to distribute an MSDS for each product to each of its downstream customers.

[5]It is hardly surprising that these purchases by employers should take place from retail stores. Many small companies that incidentally use "hazardous" household products on the work site may, as a matter of convenience, purchase them, in retail quantities, at the retail level. An employee of a small plumbing firm for example, may use a household cleanser to clean the company premises. Because the company is in the plumbing business — not the janitorial business — it may not have an account with a supplier of commercial cleaning products. A logical place for that plumbing company to purchase small quantities of household cleanser is the retail grocery or supermarket.

B. The HCS Exemption for Drug Products Is of Little Use to the Food and Grocery Distribution Industries

Drug products are covered by two marginally useful exemptions. Drugs "in solid, final form for direct administration to the patient (*i.e.*, tablets or pills)" are exempt from the scope of the HCS. 29 C.F.R. § 1910.1200(b)(6)(viii) (1988). In addition, all drugs, even if not in tablet or pill form, are exempt if they are packaged for retail sale to consumers and are held in a retail establishment. 29 C.F.R. § 1910.1200(b)(6)(v) (1988).

A variety of packaged, OTC drug products that are not in pill or tablet form, *e.g.*, liquid cough medicines and topical ointments, could be considered "hazardous." These packaged OTC drug products are exempt only when held at the *retail* level. 29 C.F.R. § 1910.1200(b)(6)(v) (1988). Thus, they are subject to the HCS's MSDS requirements when held in *wholesale* grocery warehouses operated by members of *amici*. Insofar as *amici's* members may distribute these drug products to their own or third-party wholesale facilities, MSDS pass down requirements would likewise apply.

In addition, members of *amici* and their customers operate retail pharmacies located in retail groceries and supermarkets. Prescription drug products are not packed for retail sale; rather, by law they must be dispensed by trained pharmacists who are licensed under applicable state laws. Unless a prescription drug product is in tablet or pill form, it is not exempt from the HCS. If these drug products are "hazardous" within the meaning of the HCS, they are subject to the HCS's MSDS requirements, even though they are dispensed only by licensed pharmacists at the retail level. As noted by OMB, the end result is "the odd situation in which a drugstore owner [such as a grocer or supermarket] would be responsible for training

professional pharmacists about the hazards of the drugs they handle." Pet. Writ Cert. 22a, 37a.

C. The HCS Imposes Significant Paperwork Burdens on the Food and Grocery Distribution Industries

The burden imposed on the food and grocery distribution industries by the HCS is tremendous. In its decision reviewing the paperwork requirements of the HCS, OMB noted that, according to information supplied by *amicus* FMI, a "typical supermarket would sell 1,200 non-food consumer products that may be covered by the HCS." Pet. Writ Cert. 35a. Thus, a typical retail supermarket may have to establish and maintain a filing and distribution system for approximately 1,200 different MSDSs should the Third Circuit's decision be allowed to stand. Not only must these MSDSs be received, filed, and made readily available to any commercial customers, but the MSDS file must be kept up-to-date as new or revised MSDSs are prepared by product manufacturers and distributed downstream, through *amici's* wholesaler members, to that retailer.

The burden on *amici's* members is compounded by the fact that products sold in retail groceries and supermarkets almost never pass directly from the product manufacturer to the retailer. Instead, products go from the product manufacturer, through one or more levels of wholesale distribution, before they reach the retailer. A typical large wholesale grocery warehouse may handle up to 1,200 different products covered by MSDSs, which are received from manufacturers and distributed in turn to several dozen smaller, regional or local wholesale warehouses. Each of these smaller warehouses may service hundreds of different retail and institutional foodservice establishments. Each retailer may have more than one

wholesale source for any particular product. Establishments at each level of distribution must obtain, retain, and disseminate MSDSs.

The total number of food and grocery distribution establishments involved is huge. For example, there are approximately 180,000 different retail grocery establishments in the United States. A typical wholesale facility may service up to 1,000 different retail establishments. A typical foodservice distributor may serve thousands of different institutions such as restaurants and caterers.

As a result of this layered distribution network for grocery items, MSDSs involving, for example, 1,200 "hazardous" products, could result in the need to receive, catalogue, file, and distribute millions pieces of paper each year for a single grocery distribution firm. Given the volume of paper involved, as well as the minimal benefits to be derived thereby, the paperwork burden associated with the HCS, in the absence of OMB's across-the-board exemptions, is staggering.

Further compounding the burden on *amici's* members is the continually changing nature of the products they handle. Consumer products are by no means static. Each year many new products are introduced and existing products are changed, resulting in new or revised MSDSs. Even if products are unchanged, MSDSs must be updated by product manufacturers to take into account new scientific, technical, or medical information. 29 C.F.R. § 1910.1200(g)(5) (1988).

The availability to workers of MSDSs for the two classes of products covered by the OMB disapproval decision (consumer products and drugs) will not result in any appreciable increase in workplace safety or diminution of workplace hazards. The purported hazards associated with these products simply are no greater, either qualitatively or quantitative-

ly, than the hazards typically presented by familiar household products used in the home and that are already federally regulated as to labeling, safety, and storage information.

In light of the burdens involved, OMB disapproved coverage under the HCS of:

> any consumer product excluded by Congress from the definition of "hazardous chemical" under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986 (SARA) [Pub. L. No. 99-499, 100 Stat. 1613 (1986)]: "Any substance to the extent it is used for personal, family or household purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public."

Pet. Writ Cert. 35a-36a. OMB also disapproved all coverage outside the manufacturing sector of drug products regulated by the Food and Drug Administration (FDA). Pet. Writ Cert. 37a.

The effect of the OMB disapproval decision was to create two across-the-board exemptions for CPSC-regulated consumer products and FDA-regulated drugs from the scope of the HCS. Because these categories of products are totally exempt from the HCS, the food and grocery distribution industries are not burdened by its requirements, including, most importantly, the MSDS requirements. In contrast, as noted above, the HCS as promulgated in August 1987 does not provide any meaningful exemptions for either consumer products or drug products.[6]

[6]One practical result of the overbroad imposition of MSDS requirements upon consumer and drug products resulting from the Third Circuit's decision is that product manufacturers may prepare and distribute MSDSs for products that are not, in fact, "hazardous" in the regulatory sense. This is done to provide extra protection against product liability claims. Members

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IS CONTRARY TO THE EXPRESS STATUTORY PURPOSE OF THE PAPERWORK REDUCTION ACT TO MINIMIZE FEDERALLY MANDATED PAPERWORK

The statutory purpose of the Paperwork Reduction Act is embodied in 44 U.S.C. § 3501, which provides, in pertinent part, that "[t]he purpose of this chapter is . . . to minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons." The Director of OMB in the Executive Office of the President is entrusted with carrying out this mission. 44 U.S.C. § 3504(a); *see also* S. Rep. No. 930, 96th Cong., 2d Sess. 5-6, *reprinted in* 1980 U.S. CODE, CONG. & ADMIN. NEWS 6241, 6245-46.

The authority of the Director in this regard includes the power to determine "*whether* the collection of information by an agency is *necessary* for the proper performance of the functions of the agency." 44 U.S.C. § 3504(c)(2) (emphasis supplied). "To the extent, if any, that the Director determines that the collection of information by an agency is *unnecessary*, for any reason, the agency may not engage in the collection

of *amici* are theoretically free to make their own determinations about whether products are "hazardous" for purposes of the HCS, thereby allowing them to disregard all MSDSs received from product manufacturers for products that are not in fact "hazardous" in the regulatory sense of the word. 29 C.F.R. § 1910.1200(d)(1) (1988). As a practical matter, however, members of *amici* lack the expertise to do so. Thus, absent broad, across-the-board exemptions for general categories of products from the HCS, such as those that the Third Circuit invalidated, the food and grocery distribution industries have little choice but to maintain and distribute all MSDSs received.

of the information." 44 U.S.C. § 3508 (emphasis supplied).[7] The Director, in making this determination, must consider whether the information sought "(1) has practical utility for the agency, (2) is ***not more than the minimum needed*** to meet the agency's objective, *or* (3) is not *duplicative* of similar information otherwise accessible." S. Rep. No. 930 at 49, 1980 U.S. CODE, CONG. & ADMIN. NEWS 6289 (emphasis supplied). As promulgated by OSHA and as reinstated by the Third Circuit, application of the MSDS requirements to consumer products and drugs within the food and grocery distribution industries fails both the second and third prongs of this test.

[7]The Paperwork Reduction Act grants the Director the authority to approve or disapprove "information collection request[s]." 44 U.S.C. § 3504(c). Information collection requests are defined to include:

> a written report form, application form, schedule, questionnaire, reporting or ***recordkeeping requirement***, collection of information requirment, ***or other similar method calling for the collection of information***.

44 U.S.C. § 3502(11) (emphasis supplied). A "recordkeeping requirement" is further defined to mean "a requirement imposed by an agency on persons to ***maintain*** specified records." 44 U.S.C. § 3502(17) (emphasis supplied). The underlying OSHA regulation on MSDSs requires:

> The employer shall ***maintain*** copies of the required material safety data sheets for each hazardous chemical in the workplace, and ***shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s)***.

29 C.F.R. § 1910.1200(g)(8) (1988) (emphasis supplied). The MSDS to be maintained by all employers is clearly (1) the obtaining and maintaining of facts, (2) through the use of a recordkeeping requirement, (3) for specified records. As such, it is an "information collection request" requiring approval by the Director. *See Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449, 1453-54 (D.C. Cir. 1988) *pet. for cert. pending* No. 88-849 (filed Nov. 22, 1988) (under the substantially similar definitions of the predecessor Federal Reports Act).

A. OMB Properly Exercised Its Authority To Eliminate OSHA's Paperwork Requirements That Duplicate Requirements of Other Federal Agencies

OSHA's objective of providing a safe working environment is not served by the massive compilation of paper describing consumer products and drugs that are already subject to detailed labeling requirements concerning use, storage, and hazards. The information OSHA seeks to have generated and disseminated on its behalf is already mandated by the CPSC for hazardous consumer products,[8] the Environmental Pro-

[8]The definition of a "hazardous substance" under the Federal Hazardous Substances Act and the criteria for determining when a product is "hazardous" under the HCS are similar. *Compare* 15 U.S.C. § 1261(f)(1)(A) *with* 29 C.F.R. § 1910.1200(d) (1988) and its Appendices A, B, and C. Under the Federal Hazardous Substances Act, a hazardous substance is "misbranded" unless the label:

> states conspicuously (A) the name and place of business of the manufacturer, packer, distributor or seller; (B) the common or usual name or the chemical name (if there be no common or usual name) of the hazardous substance or of each component which contributes substantially to its hazard . . . (C) the signal word "DANGER" on substances which are extremely flammable, corrosive, or highly toxic; (D) the signal word "WARNING" or "CAUTION" on all other hazardous substances, (E) an affirmative statement of the principal hazard or hazards, such as "Flammable", "Combustible", "Vapor Harmful", "Causes Burns", "Absorbed Through Skin", or similar wording descriptive of the hazard; (F) precautionary measures describing the action to be followed or avoided . . . (G) instruction, when necessary or appropriate, for first-aid treatment; (H) the word "poison" for any hazardous substance which is defined as "highly toxic" by subsection (h) of this section; (I) instructions for handling and storage of packages which require special care in handling or storage; and (J) the statement (i) "Keep out of the reach of children" or its practical equivalent, or, (ii) if the article is intended for use by children and is not a banned hazardous substance, adequate directions for the protection of children from the hazard.

(footnote continued)

tection Agency (EPA) for pesticides,[9] and the FDA for drugs.[10] On this basis, the Director properly disallowed the application of MSDS requirements to these products as duplicative of information already disseminated, and disseminated more efficiently, pursuant to other federal regulation.

B. OMB Properly Determined That HCS Information Collection Requirements Exceeded Those Necessary To Achieve OSHA's Objectives

In light of the very limited utility to employees of MSDSs concerning consumer products and drugs, any MSDS requirements as applied to these products cannot be regarded as "necessary" to the agency's performance. On this separate and additional basis the Director disallowed the retention and dissemination of information concerning these products. In reaching that decision, the Director properly carried out the express statutory mandate of the Paperwork Reduction Act.

OMB's disapproval of HCS coverage of consumer products, to the extent such products are totally exempt from the EPA-

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15 U.S.C. § 1261(p)(1). As discussed on page 7, *supra*, the information required in an MSDS is similar. Information required by the Federal Hazardous Substances Act, which is distributed to wholesalers and retailers as part of the federally mandated labeling, therefore parallels MSDS requirements under the HCS.

[9]The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y, regulates the registration and use of pesticides. Under the authority of FIFRA, EPA has promulgated regulations setting forth the labeling requirements for pesticides. 40 C.F.R. Part 156 (1988). These labeling requirements include the name and address of the producer or registrant of the pesticide, an ingredient statement, warnings or precautionary statements according to the toxicity of the presticide, and directions for use. 40 C.F.R. § 156.10(a) (1988).

[10]The Federal Food, Drug and Cosmetic Act controls the labeling of drug products. *See* 21 U.S.C. §§ 352 and 355. FDA has adopted detailed requirements on drug product labeling. *See* 21 C.F.R. Part 201 (1988).

administered right-to-know provisions of SARA, further supports the conclusion that OMB properly carried out its statutory mandate. As OMB stated, its decision:

> makes the OSHA and EPA right-to-know paperwork requirements, which are closely linked, mutually consistent. Using the same exemption in both rules avoids the situation in which employers must separate the paperwork for their "consumer products" into two groups: an OSHA "consumer product" and an EPA "consumer product."

Pet. Writ Cert. 36a. To the extent the HCS went beyond the scope of the SARA right-to-know provisions, it went beyond the minimum needed to accomplish OSHA's goal. As such, it was properly disapproved by OMB.

This Court has recognized that OSHA may be tempted "to impose enormous costs that produce little, if any, discernible benefit." *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 645 (1980) (*Benzene*). To avoid this result, the *Benzene* Court determined that the definition of "safe and healthful employment" under Section 3(8) of the Occupational Safety and Health Act does not empower OSHA "to require . . . absolutely risk-free workplaces whenever . . . technologically feasible. . . ." Instead, the Act allows OSHA to impose costs only to eliminate "significant risks" of harm. *Id.* at 641-42.

Similar concerns underlie the issues in this case. OSHA, left totally on its own, is likely to impose enormous paperwork burdens that produce little, if any, discernible benefit. "[S]ingle mission agencies do not always have the answers to complex regulatory problems" involving issues outside the agency's area of direct focus. *Sierra Club v. Costle*, 657 F.2d 298, 306 (D.C. Cir. 1981) (per Wald, J.). The possibility that OSHA will ignore the burdens the HCS places on firms such

as those represented by *amici* in exchange for minor or hypothetical reductions in risk is completely demonstrated by the circumstances now before this Court.

The purpose of the Paperwork Reduction Act is to ensure that neither OSHA nor any other agency *is* left entirely on its own when it creates information collection requirements. Instead, OMB is to provide a limited, carefully circumscribed, ***but independent***, review of the necessity for the requirement in terms of the agency's mission.

The Paperwork Reduction Act specifically grants the OMB Director the authority to "determin[e] ***whether*** the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility." 44 U.S.C. § 3504(c)(2) (emphasis supplied). Although the seemingly absolute authority of the Director must be exercised "consistent with applicable law," 44 U.S.C. § 3504(a), and although the statute shall not be interpreted "as increasing or decreasing the authority of the President, [OMB,] or the Director thereof . . . with respect to the substantive policies and programs of departments, agencies and offices," 44 U.S.C. § 3518(e), the clear import of the Act is that while an agency retains authority to determine its substantive regulatory objectives, OMB has a statutory responsibility to review whether the agency has chosen effective information collection methods to achieve those objectives.

Far from being an illicit intrusion on OSHA's substantive power, as assumed by the court below, *USWA III*, 855 F.2d at 113, OMB review is a crucial and highly beneficial part of the standard-setting process. "The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative

rulemaking. . . . An over-worked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the argument and ideas of policymakers in . . . the White House." *Sierra Club*, 657 F.2d at 306 (footnotes omitted).

The Paperwork Reduction Act represents a statutory codification of the truism about the administrative process expressed in *Sierra Club*. It also represents a recognition by Congress that judicial review should not be the only safeguard against unnecessary agency action. The ruling of the Third Circuit, if upheld, would make the Act a nullity. OMB would be unable to disapprove any information collection requirements lest someone argue that elimination of the request, no matter how onerous, in some manner impinged, however tangentially, on the agency's substantive mission.

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be vacated and OMB's disapproval of the OSHA regulations at issue should be upheld.

Respectfully submitted.

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